

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,)
)
)
Plaintiff,) CASE NO. 18-CV-566
)
vs.)
)
ANDREW CUOMO, et al.,)
)
Defendants.)
_____)

**TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. THOMAS J. MCAVOY
MONDAY, SEPTEMBER 10, 2018
ALBANY, NEW YORK**

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NRA of America v. Cuomo et al. - 18-CV-566

1 (Open court, 10:00 a.m.)

2 THE COURT: So why don't you call the NRA case and get
3 everybody up here. I guess everybody is here. Is there any
4 amici here? No amici. So that means we get a half hour from
5 the plaintiff and a half hour from the defendant?

6 MR. BREWER: Yes, Your Honor.

7 THE COURT: Is that right?

8 MS. KERWIN: Yes, sir.

9 THE COURT: Don't go over that. I thought the briefs
10 submitted by the amici people were pretty good. I enjoyed
11 reading them, and I'm sure you did too.

12 Well, this is defense motion to dismiss the second
13 complaint, the amended complaint on the ground that it fails to
14 state a cause of action upon which federal relief can be
15 granted. So what does the defense have to say about that?

16 Why don't we call the case and get the appearances
17 first?

18 THE CLERK: National Rifle Association of America
19 versus Andrew Cuomo et al., 18-CV-566. May I have the
20 appearance on behalf of the plaintiff?

21 MR. BREWER: Good morning, Your Honor. My name is
22 Bill Brewer. I'm here with my partners Stephanie Gase and Sarah
23 Rogers. Also assisted today by Cooper & Kirk, Chuck Cooper and
24 Joel Alicea.

25 THE COURT: Wow. You guys really come in groups,

NRA of America v. Cuomo et al. - 18-CV-566

1 don't you?

2 MR. BREWER: You know, for me, Your Honor, it was an
3 opportunity to be back in Albany, in the Hudson Valley where I
4 went to school, and glad to be in your court.

5 THE COURT: That's good. I enjoy Albany too. It's a
6 great city. I went to school here as well and never wanted to
7 leave, but circumstances took me back to Binghamton, New York,
8 and I've been hiding down there for a long time.

9 MR. BREWER: That's where you're from. I'm from Long
10 Island. So I went back downstate.

11 THE COURT: Long Island is a good place. My best man
12 was from Point Lookout from the island.

13 Who do we have from the other side?

14 MS. KERWIN: Good morning, Your Honor. Adrienne
15 Kerwin for the Attorney General on behalf of Governor Cuomo,
16 Maria Vullo, and Department of Financial Services. With me
17 today I have general counsel for DFS Nathaniel Dorfman and
18 Assistant Attorney General Helena Pederson.

19 THE COURT: Welcome, folks. We're glad you came, and
20 we'll hear your argument as soon as we listen to -- you guys are
21 defense. So you're going first.

22 MS. KERWIN: We're first.

23 THE COURT: What are you going to tell me why this
24 matter should be dismissed?

25 MS. KERWIN: Your Honor, the complaint in this case

NRA of America v. Cuomo et al. - 18-CV-566

1 does nothing more than describe three completely distinct legal
2 actions by the state. First, it discusses government speech by
3 Superintendent Vullo through two guidance letters sent to all
4 insurers and financial institutions doing business in New York.
5 Second, it discusses lawful, reasonable, and prudent regulatory
6 action taken by DFS against Chubb and Lockton for violations of
7 New York law. Third, it discusses protected government speech
8 by Governor Cuomo within press statements that express the
9 governor's political positions and beliefs in connection with
10 the NRA.

11 What the complaint does not do, however, is allege any
12 Constitutional violation by Governor Cuomo, Superintendent
13 Vullo, or DFS. There are no allegations in the complaint
14 sufficient to remove the guidance letters and press releases
15 from the protections of the First Amendment or subject the
16 consent orders to the First Amendment at all. Speech by the
17 government --

18 THE COURT: You have to slow down because if you kill
19 my stenographer, we're going to have to adjourn this for another
20 week.

21 MS. KERWIN: Got it.

22 Speech by the government only loses First Amendment
23 protections when it can reasonably be interpreted as
24 communicating that some form of punishment or adverse state
25 action will follow the failure to do as the government demands.

NRA of America v. Cuomo et al. - 18-CV-566

1 Government speech that attempts to convince a course of action,
2 and not coerce it, maintains First Amendment protection.

3 When the actual contents of the guidance letters and
4 press releases are read, they cannot be objectively interpreted
5 as threatening any kind of coercive criminal or regulatory
6 actions. The type of language deemed objectively capable of
7 being seen as threatening or coercive is completely absent, and
8 as a result, no reading of the guidance letters or press
9 releases may reasonably be viewed as an implied threat and not
10 subjected itself to First Amendment protection.

11 In light of this clear conclusion, the NRA
12 mischaracterizes the guidance letters to the Court and suggests
13 that the Court must view the guidance letters as the NRA does.
14 However, the test is an objective one, and I think everyone in
15 this room would agree that the NRA does not view statements made
16 by or on behalf of Governor Cuomo about the NRA as objective.

17 Therefore, while the Court must accept all facts
18 alleged in the complaint as true on this motion, it is not
19 required to accept the NRA's mischaracterization of the actual
20 document-based facts or its empty, conclusory, unsupported
21 statements as true. Instead, the Court must look at the actual
22 instances of speech at issue in this case objectively.

23 Additionally, Second Circuit has made clear in
24 Hammerhead, Zieper, and others that the government's motives are
25 irrelevant to whether speech can reasonably be interpreted by

NRA of America v. Cuomo et al. - 18-CV-566

1 the Court as threatening or coercive. Therefore, it is the
2 government's speech itself and not the allegations about the
3 government's motivations in expressing that speech that is
4 relevant to the objectiveness inquiry that the Court must apply
5 on this motion to dismiss.

6 When read objectively, the guidance letters do not
7 demand any action from any company or threaten any penalty for
8 failing to comply with any government directive. Although DFS
9 does have regulatory supervision over the approximately 3,200
10 insurers and financial institutions to whom the guidance letters
11 were sent, that factor is not determinative of whether the
12 guidance letters are protected government speech or
13 unconstitutional threats of coercive state action. The words
14 themselves must be read within the context of the document.

15 When so read, the only objective conclusion that can
16 be drawn is that the guidance letters do not direct, much less
17 threaten, any company to do anything at all. At most, the
18 guidance letters remind insurers and financial institutions of
19 their obligation to constantly evaluate reputational risks and
20 take any actions necessary to manage those risks consistent with
21 their corporate social responsibility obligations.

22 DFS has the right and in fact is obligated to warn
23 entities of potential reputational risks. If it can't do so
24 through guidance letters like this which are generally
25 applicable industry wide, then how could it ever do so?

NRA of America v. Cuomo et al. - 18-CV-566

1 THE COURT: Why is reputation important? What
2 difference does it make what their reputation is as long as they
3 follow the law?

4 MS. KERWIN: Reputational risk can go to a company's
5 bottom line. If customers of that company disagree with a
6 business relationship that company may have with an
7 organization, it can pull its business and it can effectively
8 decrease their bottom line and lose business. So it's necessary
9 to think about what customers of a company may relate that
10 company to, and if it's to a social issue that most of the
11 country, a good number of people in the country are against,
12 then that company will necessarily lose, could necessarily lose
13 business. So it is a relevant inquiry that companies should
14 make.

15 THE COURT: So it's like the Nike case, right?
16 Whether or not you put something like that and tie it to a
17 certain quarterback and half the country loves him and half the
18 country hates him. So it's important that you look at how that
19 may affect the bottom line of a company that's doing business
20 with the NRA.

21 MS. KERWIN: Right. You have to look at the balance,
22 which way. What is this campaign going to do to our business?
23 It's going to attract people. Is it going to make people stop
24 buying Jordans?

25 For the cases in which government speech has been

NRA of America v. Cuomo et al. - 18-CV-566

1 reasonably interpreted as threatening state action involved
2 government speech being directed at one person or entity who is
3 known to the government to be involved with the dissemination of
4 the plaintiff's message. In Bantam Books, the commission's
5 notice was sent to one publisher. In Okwedy, the borough
6 president's letter was sent to one company. In Rattner, the
7 government's letter was sent to one newspaper.

8 Here, the government -- the guidance letters were not
9 directed at any specific companies at all, much less companies
10 known to the state to be in business relationships with the NRA.
11 Instead, they were sent industry wide and contained generally
12 applicable guidance. Therefore, it cannot be credibly argued
13 that the plain language of the guidance letters can objectively
14 be deemed as threatening regulatory action against the over
15 1,800 insurers and 1,400 banking institutions to whom the
16 guidance letters were sent. Importantly --

17 THE COURT: I hate judges that do this. What do you
18 say about paragraph 38 of plaintiff's complaint? I think there
19 is some specific threatening language as the Court read it in
20 that paragraph. I'd like you to discuss that if it wouldn't
21 throw you off your presentation.

22 MS. KERWIN: Paragraph 38, that paragraph, correct?

23 THE COURT: Right.

24 MS. KERWIN: States that throughout its purported
25 investigation of Carry Guard in late 2017 and early 2018, DFS

NRA of America v. Cuomo et al. - 18-CV-566

1 communicated to banks and insurers with known or suspected ties
2 to the NRA that they would face regulatory action if they failed
3 to terminate their relationship with the NRA.

4 THE COURT: That's pretty strong wording, isn't it?

5 MS. KERWIN: It's a pretty strong conclusory statement
6 with no facts to bolster it whatsoever. I mean this is the kind
7 of statement that Iqbal warns against. You can't just say there
8 were all these communications and people stopped --

9 THE COURT: You've got to point to certain
10 communications and point to what they said, right?

11 MS. KERWIN: Yes. Who said it, what the words were,
12 right.

13 THE COURT: Right. That's what's important here, to
14 flesh that paragraph out.

15 MS. KERWIN: Right.

16 THE COURT: If they can do that, they've got a pretty
17 strong argument. If they can't do it, they don't, right?

18 MS. KERWIN: If they could do that, we'd by talking
19 about a different issue on a different motion, but the fact is
20 this is the second time they've alleged this complaint, and they
21 still haven't identified anything at all with respect to those
22 kind of allegations.

23 THE COURT: Thank you.

24 MS. KERWIN: As Your Honor just referred to the Nike
25 case, DFS's statements in this case follow the actions of a

NRA of America v. Cuomo et al. - 18-CV-566

1 large number of major companies that cut ties with the NRA in
2 the days and weeks following the February 14, 2018, massacre in
3 Parkland, Florida, and the NRA's public responses to it.
4 Companies nationwide were evaluating their reputational risks
5 and social responsibilities and making the choice that
6 continuing business relationships with the NRA could not coexist
7 with their corporate values.

8 By the time that the April guidance letters were
9 issued, the list of companies that determined that the
10 reputational risks of maintaining business relationships with
11 the NRA was too great to justify their continued relationship,
12 those companies were companies such as Bank of America,
13 Citicorp, First National Bank of Omaha, Enterprise Holdings,
14 Best Western, Wyndham Hotels, Dick's Sporting Goods, Walmart,
15 Kroger. Other very large, influential companies in this county
16 had already done it by the time these guidance letters came out.
17 The guidance provided by DFS at Governor Cuomo's direction was
18 not new or novel. It was consistent with this national shift
19 towards support for more rigorous gun regulation and an already
20 overwhelming corporate response.

21 For New York to continue to maintain secured insurance
22 and financial services markets, DFS had an obligation to ensure
23 that insurance and financial institutions continued to manage
24 risks that could affect the soundness of those institutions.
25 That companies may have been convinced to take action as a

NRA of America v. Cuomo et al. - 18-CV-566

1 result of the guidance letters does not make the guidance
2 letters coercive since, as recognized by the Second Circuit,
3 attempts by government to convince are themselves protected by
4 the First Amendment.

5 As a regulatory body, DFS routinely directs companies
6 under its supervision to take or refrain from actions that
7 violate the law and warns that regulatory sanctions will result
8 from a company's failure to comply with existing law. Such
9 warnings are not made under a thin veil and don't contain any
10 ambiguity whatsoever. Instead, DFS uses plain language that is
11 direct and straightforward.

12 For instance, as referenced in footnote 5 of our reply
13 brief, DFS issued guidance to insurers outlining what the law
14 requires in connection with providing coverage for contraceptive
15 drugs and devices, which concluded with the statements, "DFS
16 will continue to ensure full compliance with these consumer
17 health protections." This statement on its face specifically
18 informed insurers DFS would be taking regulatory action to
19 ensure that insurers comply with the law as outlined in the
20 guidance.

21 Additionally, in connection with providing guidance to
22 lenders about ensuring nondiscrimination in the offering of
23 automobile loans, DFS informed companies that DFS "will continue
24 to conduct fair lending examinations to review indirect
25 automobile lending programs where appropriate and take any other

NRA of America v. Cuomo et al. - 18-CV-566

1 supervisory or enforcement actions necessary to ensure that
2 lending in New York State is fair and nondiscriminatory." This
3 language told the people getting these guidance letters that DFS
4 would be watching and DFS would be making sure that these
5 companies were complying with what was in that guidance letter.

6 That's not the case here. No such language is found
7 in the guidance letters. Instead, DFS encouraged insurers and
8 financial institutions to continue evaluating and managing their
9 risks, continue assessing compliance with their own codes of
10 social responsibility, and encouraged companies to review their
11 relationships within the context of managing reputational risks
12 and corporate social responsibility. This language cannot be
13 objectively read as coercive or threatening.

14 The Governor's April 2018 press release about the
15 guidance letters similarly contained no language that can
16 objectively, reasonably be viewed as a threat, implied or
17 otherwise. It contains no threats of state action at all and
18 makes no suggestion that the government would be taking any role
19 in companies' own assessment of their own reputational risks.
20 The press release was not aimed at any particular insurer or
21 financial institution and did not direct any company to take any
22 action whatsoever.

23 Therefore, under the Second Circuit test in *Okwedy*
24 versus *Molinari*, the complaint fails to allege that the guidance
25 letters or the Governor's press release are anything other than

NRA of America v. Cuomo et al. - 18-CV-566

1 government speech that is protected by the First Amendment. As
2 a matter of law, the exception of Okwedy does not apply here to
3 the facts as alleged in the complaint, and plaintiff's first and
4 second causes of actions should be dismissed.

5 The complaint's allegations relating to consent orders
6 with Lockton and Chubb fail without any First Amendment analysis
7 needing to be applied at all. On their face, the consent orders
8 resolve DFS's investigation into violations of the Insurance Law
9 by Lockton and Chubb. The consent orders were voluntarily
10 entered into by two sophisticated players in the insurance
11 industry and include admissions of violations of the Insurance
12 Law by both Lockton and Chubb.

13 The First Amendment is not implicated by the
14 enforcement of laws directed at unlawful conduct because
15 unlawful conduct is outside the limits of the First Amendment
16 protections. Recognizing that unlawful conduct is not protected
17 by the First Amendment, the NRA has attempted to distance itself
18 and its argument from the DFS's investigation of Carry Guard,
19 which provided illegal insurance for intentional unjustified
20 shootings, which is obviously contrary to the Insurance Law and
21 public policy.

22 Instead, in its brief, the NRA states that its First
23 Amendment claims do not challenge any consent order provisions
24 that pertain to Carry Guard or any program for which unlawful
25 conduct is alleged. In making that argument, the NRA

NRA of America v. Cuomo et al. - 18-CV-566

1 specifically cites to two sentences out of its 142-paragraph
2 complaint, and those sentences are found in the complaint at
3 paragraph 54 and 62, and those sentences in the complaint
4 contain provisions in which -- allege that the consent orders
5 contain provisions in which Lockton and Chubb agree not to
6 participate in any affinity programs with the NRA, even if they
7 comply with the law, unlike Carry Guard.

8 However, even limited to these two sentences, the
9 NRA's First Amendment claims related to the consent orders fail
10 to state a claim for two reasons. First, a party to an
11 agreement is free to agree to anything it wants, including an
12 agreement to limit otherwise Constitutionally-protected conduct.
13 Second, as the consent orders specifically state, the NRA
14 affinity programs administered by Lockton and those underwritten
15 by Chubb were illegally marketed and promoted by the NRA with
16 the full knowledge and involvement of Lockton and Chubb.

17 Additionally, as a result of its business contracts
18 with Lockton and Chubb, the NRA was involved in providing
19 unlawful benefits to owners of the affinity policy. The
20 inclusion in an agreement that a violator of the law will not
21 engage in certain types of conduct or business relationships
22 with whom it previously engaged in illegal conduct is not only
23 not illegal or unconstitutional, it's a common provision in
24 resolutions of criminal and civil enforcement investigations and
25 is rationally based.

NRA of America v. Cuomo et al. - 18-CV-566

1 Additionally, the two DFS press releases attached to
2 the complaint as exhibits A and B relate only to the illegal
3 Carry Guard program and the false affidavits submitted by
4 Lockton in connection with the administration of the NRA's other
5 affinity programs. Since the NRA now argues that it is not
6 challenging any state action related to unlawful conduct, it has
7 necessarily abandoned any claims related to the DFS press
8 statements attached to the complaint.

9 In a desperate effort to allege a cognizable First
10 Amendment claim, the NRA attempts to bootstrap instances of
11 legal government conduct and argue that the guidance letters,
12 press releases, and consent orders should be viewed in
13 connection with statements made by Governor Cuomo adverse to the
14 NRA. In other words, the NRA is asking the Court to recognize a
15 cause of action that imposes liability on a Governor's political
16 speech.

17 Political speech is precisely the type of speech that
18 the First Amendment was intended to protect, not penalize.
19 Governor Cuomo has the absolute right to publicly challenge the
20 NRA and the position it advocates for. In fact, the complaint
21 alleges that Governor Cuomo and the NRA have been engaged in
22 public political debate for decades, and it is the very business
23 of government to favor and disfavor different points of view and
24 attempt to garner agreement with its own viewpoints.

25 Despite this longstanding political disagreement, it

NRA of America v. Cuomo et al. - 18-CV-566

1 was not until DFS began investigating Carry Guard within six
2 months of its existence and discovered that it provided illegal
3 liability coverage for causing intentional unjustified death
4 that the NRA -- only then did the NRA allege that Governor Cuomo
5 violated its rights.

6 As the consent orders set forth, the NRA publicly
7 purported to have developed and created Carry Guard and
8 vigorously, aggressively marketed, solicited, and promoted Carry
9 Guard without being licensed to do so and was being paid to do
10 so. It was only after illegal Carry Guard was shut down that
11 the NRA brought this lawsuit and tried to tie its business
12 losses to Governor Cuomo's opposition to the NRA and the First
13 Amendment. However, the First Amendment does not recognize such
14 a claim.

15 Contrary to the unsupported analysis urged by the NRA,
16 a totality of the circumstances analysis does not apply here.
17 Such an argument requires the Court to evaluate separate,
18 distinct, unrelated lawful instances of Constitutionally-
19 protected conduct against a political backdrop and infer an
20 implied threat. The First Amendment does not recognize such an
21 analysis and instead prohibits the imposition of liability for
22 the expression of a political viewpoint, the enforcement of the
23 law, or government speech.

24 The only case cited by the NRA in support of this
25 proposition is inapplicable. That case was Bantam Books, and in

NRA of America v. Cuomo et al. - 18-CV-566

1 Bantam Books, the language involved there specifically thanked
2 the publisher in advance for cooperating with the government and
3 reminded the publisher that the commission had an obligation to
4 report or to refer prosecutions to the Attorney General and
5 informed the publisher that the list of that publisher's books
6 would be sent to the police.

7 That government speech on its face could reasonably be
8 interpreted as an implied threat since it warned of criminal
9 prosecution and police involvement. Because of this objective
10 interpretation of the four corners of the speech at issue in
11 that case, the Court then as a factfinder considered other
12 circumstances outside of the actual speech to determine whether
13 the motivation behind the speech was intended to coerce.

14 Here, the guidance letters, press releases, and
15 consent orders on their face do not objectively direct any
16 company to do anything. Accordingly, nothing the defendants did
17 violated the law, and since as a matter of law the guidance
18 letters, press releases, and consent orders cannot objectively
19 be reasonably interpreted as threatening any type of state-
20 inflicted punishment, consideration of any other factors is not
21 relevant, even if pled in the complaint.

22 Also fatal to the NRA's first and second causes of
23 action is the complete failure to allege any particularized
24 instance of speech that has been infringed by the guidance
25 letters or the consent orders, which is an essential element of

NRA of America v. Cuomo et al. - 18-CV-566

1 both claims. Instead of alleging that the guidance letters or
2 press releases were issued or the consent orders entered into in
3 an effort to stifle or retaliate against any viewpoint of the
4 NRA, the complaint alleges in conclusory fashion that the
5 guidance letters, press releases, and consent orders were
6 carried out because of the Governor's disagreement with the
7 NRA's overall purpose.

8 This is contrary to the Supreme Court and Second
9 Circuit case law that demonstrates that First Amendment
10 protection is afforded only particularized instances of speech
11 or expressive conduct. What cases like *Okwedy*, *Rattner*, and
12 *Bantam Books* have in common is that the government coerced or
13 threatened a third party to stop aiding the plaintiff in
14 expressing a specific viewpoint on a particular topic. Here,
15 nothing that the defendants have done has prevented the NRA from
16 spreading its message, and the complaint does not even allege
17 that it has.

18 Applying Constitutional protection to an advocacy
19 group for its very existence strips the freedoms of speech and
20 expression protected by the First Amendment of their very
21 purpose, which is the freedom to speak or express a viewpoint.
22 Its intended purpose was not to exempt lobby groups from having
23 to allege and prove an element of a First Amendment claim as
24 required by longstanding doctrine.

25 Perhaps recognizing that it cannot allege any causal

NRA of America v. Cuomo et al. - 18-CV-566

1 link between any act of the defendants to any actual speech or
2 expression, the NRA alleges that the guidance letters, press
3 releases, and consent orders violate the NRA's freedom of
4 association. The First Amendment prohibits the imposition of a
5 general prohibition against a certain type of advocacy or
6 penalizing the expression of a particular view and requires that
7 a plaintiff allege a direct and substantial or significant
8 interference with its ability to associate.

9 The complaint here does not allege that any act of the
10 defendants penalizes or prohibits the NRA's expression of its
11 viewpoint. Instead of alleging that an interference is direct
12 and substantial or significant, the complaint attempts to lead
13 the Court through an exercise of attenuated mental gymnastics to
14 come to a conclusion that the guidance letters, press releases,
15 and consent orders will cause the NRA to have to cease
16 operations and fade out of existence.

17 Specifically, NRA alleges that because of the guidance
18 letters, press releases, and consent orders, it may not be able
19 to get corporate insurance and banking services in the future.
20 However, importantly, the complaint does not allege the NRA
21 cannot currently secure insurance or banking services. At most,
22 it alleges that its choices may be fewer because some banks are
23 agreeing with the nationwide reassessment of reputational risk
24 and corporate social responsibility commitments.

25 Not only are the allegations about securing insurance

NRA of America v. Cuomo et al. - 18-CV-566

1 and banking services entirely speculative and require attenuated
2 logic, but they are completely undermined by two factors. First,
3 DFS only regulates state-chartered banks and insurance
4 companies, and as a nationwide organization based out of state,
5 it cannot be credibly alleged that it will be left without
6 insurance and banking services because of any act of Governor
7 Cuomo or DFS.

8 Second, the consent orders themselves specifically
9 provide that Lockton may assist the NRA in procuring insurance
10 for the NRA's own corporate operations and the NRA may purchase
11 insurance from Chubb for the sole purpose of obtaining insurance
12 for the NRA's own corporate operations. These two clauses taken
13 directly from the consent orders completely undermine the NRA's
14 argument that the actions of the defendant will cause the NRA to
15 cease to associate with its members.

16 Finally, the complaint fails to allege facts
17 sufficient to support the NRA's sixth cause of action. The NRA
18 attempts to allege claims of both procedural and substantive due
19 process, but fails to allege a property right protected by the
20 due process clause or facts sufficient to allege an injury of
21 its reputation that rises to an unconstitutional level.

22 First, there's no property right under the due process
23 clause to continue business on the same terms as it had in the
24 past or to any future business opportunities. Since these are
25 the only alleged property interests in the complaint, the NRA's

NRA of America v. Cuomo et al. - 18-CV-566

1 substantive due process claims should be dismissed.

2 Second, to state a due process claim, a plaintiff must
3 allege governmental conduct that is so egregious and outrageous
4 that it can be said to shock the contemporary conscience.
5 Allegations that courts have found to shock the conscience
6 include actions done out of spite with no rational government
7 purpose. None of the alleged conduct of the defendant alleged
8 in this case -- the regulatory guidance of DFS, the enforcement
9 of the law through consent orders, and the expression of
10 political opinion by the Governor -- can credibly be argued to
11 rise to this level, particularly since they were done consistent
12 with the law and with a clearly rational purpose.

13 Third, the stigma plus claim under the due process
14 clause requires a plaintiff to plead a statement sufficiently
15 derogatory to injure the plaintiff's reputation that is capable
16 of being proven false and a material state-imposed burden. The
17 complaint fails to allege any statement by a defendant that's
18 capable of being proven false. Again because the plain language
19 of the actual statements at issue here does not rise to a level
20 that implicates the Constitution, the NRA urges the Court to
21 look at the plain language with an unobjective lens and give it
22 a meaning other than its clear plain meaning. However, when the
23 guidance letters, press releases, and consent orders are read,
24 the NRA cannot point to any statement that is capable of being
25 proven false.

NRA of America v. Cuomo et al. - 18-CV-566

1 Additionally, the complaint fails to allege that any
2 statement by the defendant resulted in any state-imposed burden
3 or change to plaintiff's status or rights. It continues as it
4 has for decades spreading its message and lobbying in favor of
5 its viewpoint.

6 In conclusion, Governor Cuomo, Superintendent Vullo,
7 and DFS respectfully request that the Court dismiss the
8 complaint in its entirety with prejudice. The government acts
9 relied upon by the NRA simply do not violate the NRA's rights.
10 Instead, the consent orders enforce the Insurance Law, a
11 government function that cannot implicate the First Amendment.
12 The guidance letters and press releases when viewed objectively
13 simply cannot reasonably be interpreted as threatening any
14 state-imposed penalty. Instead, the guidance letters and press
15 releases are protected government speech.

16 While the NRA attempts in this lawsuit to stifle
17 Governor Cuomo's and Superintendent Vullo's First Amendment
18 rights to engage in government and political speech, the law
19 simply does not allow it. The NRA's attempt to stop the
20 national momentum in favor of more vigorous gun control cannot
21 be accomplished by silencing masses of government and corporate
22 voices. That it may lose business and money because fewer
23 people and companies want to be associated with the NRA's
24 message is not a violation of the Constitution. It's a
25 political movement, which is what the First Amendment was

NRA of America v. Cuomo et al. - 18-CV-566

1 designed to protect, and accordingly, the complaint should be
2 dismissed.

3 THE COURT: Thank you very much.

4 Let's hear the other viewpoint. What's the plaintiff
5 have to say?

6 MS. ROGERS: Good morning, Your Honor. Sarah Rogers
7 for the NRA.

8 THE COURT: Good morning. Okay.

9 MS. ROGERS: I'm going to begin my discussion, unless
10 Your Honor would like me to begin elsewhere, the same place the
11 government begins because this is a really pivotal issue and
12 comes down in our favor.

13 Now, the government argues that every action and every
14 statement by Governor Cuomo, Superintendent Vullo, and DFS over
15 the course of the relevant time period must be viewed as
16 completely distinct. Those are the words they use in oral
17 argument. In their brief, they say entirely unrelated and
18 compartmentalized, that the totality of the circumstances cannot
19 be considered. That's simply not the law. In fact, the law
20 instructs us otherwise.

21 Now, counsel already referenced Bantam Books, which
22 they claim is in opposite. We claim it's not, but let's look at
23 cases within the Second Circuit. So we have the Zieper v.
24 Metzinger case in which the Second Circuit overruled summary
25 judgment in favor of the defendants on a claim like this, and

NRA of America v. Cuomo et al. - 18-CV-566

1 there the Court expressly points out that even though there is
2 no explicit, verbatim threat of a government-imposed sanction or
3 penalty, the circumstances in which the communications occurred
4 have to be considered. The fact that there are FBI agents
5 standing on plaintiff's doorstep could be conveyed to a
6 reasonable person that he's facing the threat of adverse
7 government action, and that's really the standard here.

8 If the government -- and I'm quoting Zieper as well as
9 other Second Circuit authorities. If the government encourages,
10 not mandates, not directs, but encourages the suppression of
11 protected speech in a manner that could reasonably be perceived
12 as threatening, that is an objective test, then the First
13 Amendment is implicated and indeed is violated.

14 Let's just talk about a few others cases counsel
15 mentioned, and we love these cases. All of these cases favor
16 the NRA. The Hammerhead case is one of very few Second Circuit
17 cases that actually substantiates an adverse outcome against a
18 claim like this. Even in the Hammerhead case where the letter
19 at issue, a letter that a municipal official sent to stores that
20 were stocking an offensive videogame, the letter was very mild.
21 It said, "Your cooperation will be a public service. As a
22 member of the public, I don't like this game. I implore you not
23 to stock it."

24 Even in Hammerhead based on that communication with no
25 stores responding and acceding to the threat, they still get

NRA of America v. Cuomo et al. - 18-CV-566

1 past a motion to dismiss. Indeed, that case gets a summary
2 judgment, and the Second Circuit scrutinizes the summary
3 judgment that was granted in favor of the defendant because the
4 First Amendment mandates heightened scrutiny where the
5 government is encouraging the suppression of protected speech.

6 The Okwedy v. Molinari case, that's Second Circuit
7 2003. There, likewise the totality of the circumstances was
8 extremely relevant to the Court's analysis. In the Okwedy case,
9 as Your Honor may recall, a religious group had sponsored a
10 billboard that contained Biblical messages against
11 homosexuality. And the municipal official wrote a letter to the
12 company that was hosting the billboard, said, you know, "This
13 type of intolerance is not welcome on Staten Island, and by the
14 way, we note that you have other billboards and other commercial
15 interests on Staten Island."

16 So the focus of the Court's analysis and the Second
17 Circuit emphasized is that isn't just that one particularized
18 instance of speech, and isn't just -- in fact, there was no
19 direct regulatory authority over that single billboard, but the
20 totality of the circumstances matter. The fact that this
21 municipal authority could impose adverse consequences on the
22 recipient of that threat by applying sovereign power in other
23 ways factors into that analysis and compelled the reversal of
24 the dismissal of a claim like ours.

25 So with that, I think it's pretty clear, and if Your

NRA of America v. Cuomo et al. - 18-CV-566

1 Honor isn't with me on this at all, I'd like to talk about it
2 more. It's pretty clear that the totality of the circumstances
3 matter and these communications have to be viewed in context.
4 They also have to be viewed in the light most favorable to the
5 NRA with all inferences drawn in favor of the NRA on a 12(b)(6).

6 Now, that doesn't mean as counsel suggests that you
7 have to read the communications as the NRA would. In fact, I
8 would say that the objective standard as espoused in Okwedy,
9 Hammerhead, Zieper, Bantam Books, and all these other cases
10 actually suggests that Your Honor read the DFS communications
11 and the surrounding circumstances the way that financial
12 institutions would, and in fact, the way financial institutions
13 did because this is a very persuasive fact that crops up
14 repeatedly in these cases. It's not quite dispositive, but it
15 almost is.

16 THE COURT: We don't know that is. I mean I understand
17 your point. It makes some sense to me. If you want to label
18 something as coercive or suggestive of government about to
19 exercise or can exercise certain power against these third-party
20 individuals, we have to have information from them, don't we,
21 saying, "Okay. We saw these things, and this is why we decided
22 not to do any further business with the NRA." Now you're into
23 discovery, I take it.

24 MS. ROGERS: Yes, Your Honor. That's one of the
25 issues we intend to explore in discovery and we would contend

NRA of America v. Cuomo et al. - 18-CV-566

1 that we're entitled to discovery to flesh out. But even before
2 discovery, we have some evidence alleged in the complaint,
3 certainly evidence that would support an inference on 12(b)(6),
4 that these institutions did view these communications and
5 surrounding conduct as coercive and reacted accordingly.

6 For example, we have a banker speaking on the
7 condition of anonymity to American Banker Magazine saying that
8 he viewed these communications as politically motivated. He
9 doesn't know with who he can do business now because he doesn't
10 want to incur the politically motivated disfavor of DFS. We
11 cite that in our complaint.

12 We also have a midnight phone call from a Lockton
13 executive to an NRA executive. Remember at this stage, February
14 2018, this investigation was ostensibly focused on Carry Guard,
15 the one product for which the government can cognizably allege
16 some regulatory infraction and which we'll get to later.

17 But that midnight phone call in February isn't about
18 Carry Guard. The executive does not say to the NRA, "I feel
19 pressure to drop Carry Guard." He says, "If I don't drop the
20 NRA, I want to keep doing business with you, but if I don't drop
21 you, I'm going to lose my license. I'm going to lose my
22 license."

23 So some communication has occurred, I think we can
24 reasonably infer, that Lockton believed endangered its license
25 if it does not sever ties with the NRA, and Lockton isn't the

NRA of America v. Cuomo et al. - 18-CV-566

1 only financial institution whose behavior indicates that it's
2 been the recipient of that sort of message.

3 So Lloyd's of London, a major insurance underwriter --
4 and by the way, this argument that DFS only regulates
5 state-chartered institutions, so it could not possibly incur its
6 coercive effect that would impair the NRA as a broader
7 organization, that argument is a red herring because DFS
8 addresses its guidance to all insurance companies and banks
9 doing business in New York. Well, as Your Honor knows, an
10 incredible percentage of insurance companies and banks do
11 business in New York. In fact, it reaches all the way to
12 London. We have Lloyd's of London who has no involvement with
13 Carry Guard whatsoever, undisputed fact that in the immediate
14 wake of the Chubb and Lockton consent orders announces that it
15 is severing key ties with the NRA in response to DFS scrutiny.
16 Lloyd's says that publicly.

17 So we have these institutions coming out and saying
18 that this is why they're doing what they're doing. We have
19 other institutions that don't quite say why they're doing what
20 they do, but inferences can be drawn that substantiate the NRA's
21 claims.

22 For example, we set forth allegations regarding a
23 corporate insurance carrier. Again nothing to do with Carry
24 Guard. That corporate insurance carrier had stuck with the NRA
25 through thick and thin. After the Sandy Hook tragedy, after the

NRA of America v. Cuomo et al. - 18-CV-566

1 Parkland tragedy, ready to renew coverage to the exact same
2 terms, but within days of that midnight Lockton phone call,
3 suddenly our corporate carrier tells us, "I'll give you a
4 Band-Aid. I'll extend your coverage for 90 days, but I will not
5 renew at any price," which is pretty significant.

6 That's an anomalous behavior for an insurance company,
7 which is something that fact discovery, expert discovery will
8 show, and it happens right around the same time that Lockton
9 suddenly panics. It happens around the same time that we begin
10 to hear that Chubb might drop us, that Met Life drops us,
11 another DFS-regulated entity.

12 And drawing all the inferences in favor of the
13 plaintiff as required on a motion to dismiss, I think Your Honor
14 has to give some deference to the well-pleaded allegations in
15 the complaint which set forth simply that this is not a series
16 of coincidences. Rather, this reflects a concerted, cohesive
17 campaign to drive the NRA out of New York, to do indeed what
18 Governor Cuomo states on Facebook, on Twitter, and on the
19 Statehouse steps that he wants to do.

20 THE COURT: So are you saying that we not only have to
21 focus on the language of the speech itself that were in these
22 three types of documents, but we also have to focus on what
23 third parties did in response to that speech?

24 MS. ROGERS: Absolutely, Your Honor.

25 THE COURT: Is that what you're labelling the totality

NRA of America v. Cuomo et al. - 18-CV-566

1 of the circumstances?

2 MS. ROGERS: Absolutely, Your Honor. I think the
3 cases support that. I think they really emphasize the fact that
4 a threat was perceived and acted upon. That language comes from
5 Hammerhead. It appears in some other cases as well. There's
6 the Backpage case in the Seventh Circuit. Although it's outside
7 the circuit, Posner models his opinion substantially on Second
8 Circuit law. He cites Okwedy v. Molinari quite a few times.

9 In Backpage, it's very important to Posner that Visa
10 and MasterCard, even though they had been the target of private
11 sector boycott efforts before, that Backpage had a shoddy
12 reputation. People knew it was a prostitution website. There
13 had been grassroots boycott campaigns that these companies had
14 not acceded to. It was very significant that after the sheriff
15 sends that letter, Visa and MasterCard drop Backpage. That's a
16 significant fact. Likewise, a significant fact in Okwedy v.
17 Molinari.

18 THE COURT: In that case, the sheriff had no authority
19 to do anything to Backpage. This is different.

20 MS. ROGERS: Absolutely, Your Honor. And some of
21 these cases say that it's not dispositive whether the regulator
22 who sends the letter has authority, but it's certainly
23 persuasive. It certainly matters, and DFS has direct and
24 substantial authority over all of these financial institutions.
25 It can revoke their license. It can -- the insurance companies

NRA of America v. Cuomo et al. - 18-CV-566

1 have to apply to renew the rates they're charging. It can give
2 them unfavorable treatment at that juncture. Incurring the
3 favor or disfavor of DFS is going to be very important to any
4 banker or insurance company doing business in New York.

5 THE COURT: So you're saying that the more power that
6 an entity has such as a state actor, the more cautious they have
7 to be in inferring that they might exercise that authority in
8 some fashion.

9 MS. ROGERS: I think that's a fair reading. I
10 certainly think that the degree and directness of power that the
11 government exercises over the target of the purported threat is
12 one fact in the mosaic that the Court has to consider when
13 confronted with this type of claim.

14 THE COURT: Okay.

15 MS. ROGERS: So with that, I think it's absolutely
16 true that these communications do need to be read in light of
17 the totality of the circumstances, as the analogous
18 communications of other cases are. They have to be viewed in
19 the light most favorable to the NRA as 12(b)(6) requires.

20 And let's look at the actual text of these
21 communications and the accompanying press releases because
22 within the four corners, these communications are much more
23 coercive than the state suggests. So the state claims that the
24 DFS guidance letters, that all they do is remind institutions of
25 their legal obligations to manage risk. Okay. Well, that's a

NRA of America v. Cuomo et al. - 18-CV-566

1 legal obligation, and counsel reads from or paraphrases several
2 of the concluding sentences of those guidance letters during her
3 oral argument, that DFS encourages institutions to continue to
4 manage risks and asses risks, but counsel omits one of the very
5 last sentences. DFS also encourages these institutions to take
6 prompt action in response to that.

7 In case there's any ambiguity about what prompt action
8 the regulator wants to see, the accompanying press release
9 states that Maria Vullo on behalf of DFS urges all insurance
10 companies and banks doing business in New York to join the
11 companies that have discontinued their business arrangements
12 with the NRA.

13 Let's look at that. It's not -- in a lot of these
14 cases, you have a sheriff or you have a political trustee
15 writing a letter saying, "As a father and a government official,
16 I urge you to get this pornography off our streets." That's not
17 this. She's writing on behalf of the agency. The agency urges
18 you to join the other institutions that have dropped the NRA.

19 By the way, what other institutions are there? It's
20 not Delta Air Lines that I'll get to in a minute. The press
21 release lists other DFS-regulated entities and calls them
22 DFS-regulated entities. It notes, "Chubb and Met Life, which
23 are regulated by us, have discontinued business arrangements
24 with the NRA. We're pleased by this. We urge you to take
25 prompt action to join them."

NRA of America v. Cuomo et al. - 18-CV-566

1 And then within weeks of those guidance letters,
2 illustrative, hefty fines are imposed upon two institutions that
3 did business with the NRA, and we have an inquiry that surfaces
4 against Lloyd's of London, which had nothing to do with Carry
5 Guard, suddenly announces, suddenly comes to light they are
6 facing an expensive investigation from DFS, and unsurprisingly
7 institutions respond. Unsurprisingly, that anonymous banker
8 speaks out in American Banker Magazine, says he feels chilled as
9 he'd reasonably be expected to, which is the standard.

10 Your Honor asked a question earlier. Why does
11 reputational risk matter? Why should DFS care if New York banks
12 are perceived to be allies of the NRA? DFS and the state
13 responds that, well, reputation risk can impact the bottom line,
14 and counsel also says reputation risk can affect the soundness
15 of financial institutions. We agree that risks that affect the
16 soundness of financial institutions are the type that DFS is
17 properly charged with regulating, and reputation risks can even
18 do that in some situations. One example in their reply brief
19 for the first time, the state cites prior guidance they issued
20 with respect to reputation risk in connection with incentive
21 compensation arrangements for executives.

22 But if you look at that guidance, it's very different
23 from the guidance at issue in this case because there, the state
24 does what you would expect it to do when it's dealing with an
25 actual risk to the bottom line of an institution. It points

NRA of America v. Cuomo et al. - 18-CV-566

1 out, for example, incentive compensation if improperly
2 calibrated can lead to misaligned incentives and the performance
3 of the company can suffer. It lists specific criteria for
4 evaluating incentive compensation arrangements.

5 That's not what these guidance letters do. These
6 guidance letters make perfectly plain what the state's real
7 concern is. They don't want banks to send the wrong message by
8 doing business with gun promotional organizations because they
9 believe that gun promotion advocacy leads to violence. Again
10 that's the only interpretation of their language, gun promotion.
11 It's not commercial gun promotion. The NRA is not selling guns.
12 The NRA is promoting a political environment where individuals
13 can own guns to defend themselves. They don't like that, and
14 they think that tacitly condoning it by allowing the NRA to have
15 a bank account or insurance sends the wrong message. There's no
16 effort made to quantify this reputation risk, no effort made to
17 establish guidelines on how institutions can manage it.

18 Another place reputation risk sometimes crops up in
19 financial regulation is with respect to mortgage underwriting
20 after the 2008 financial crisis. There were certain mortgage
21 underwriters that were reputationally unsound. Countrywide I
22 believe was one. There was actually a contagion effect where if
23 a bunch of Countrywide subprime mortgages default, then other
24 derivatives are affected too and that's the type of thing that a
25 financial regulator is rightly concerned with.

NRA of America v. Cuomo et al. - 18-CV-566

1 There's no evidence of that here. These sophisticated
2 financial institutions had weighed over the course of decades
3 all of the risks and benefits of doing business with the NRA,
4 and they decided that doing business with the NRA worked out in
5 their favor, and that did not change until the government
6 stepped in, wielded its sovereign power, and strongly suggested
7 that they cease doing business with their political enemy.

8 I want to address briefly this notion that there's no
9 First Amendment claim under Bantam Books and progeny unless the
10 coercive communication is directed at only one entity. I think
11 I'm getting that argument right. Well, that's just simply not
12 true. In the Playboy and Penthouse v. Meese cases from the
13 1990s, which the state cites, but I think actually favor us if
14 you really look at them. Those communications were directed
15 broadly at anyone who carried these magazines.

16 And extending the state's logic, the Governor could
17 simply put out a mandate banning the NRA from the State of New
18 York or banning it from holding a bank account, and because of
19 the broad application of that mandate, I believe the state
20 argues that no First Amendment analysis applies, but that's
21 simply not what the Constitution countenances.

22 In fact, the breadth of this mandate actually makes
23 the breach of the First Amendment more egregious because the
24 state cannot pretend, as it does with respect to Lockton and
25 Chubb, that this is a tailored interaction with one institution

NRA of America v. Cuomo et al. - 18-CV-566

1 that is engaging in risky conduct. Rather, it is a broad
2 pronouncement that gun rights groups should not enjoy financial
3 services in the State of New York.

4 We also allege additional communications apart from
5 these guidance letters, which the state has no real response to
6 except to suggest they don't need the Iqbal plausibility
7 standard, but they do. So these are the back room exhortations,
8 and I think the reason that we are entitled to favorable
9 inferences that would allow us to flesh these out in discovery
10 that we've seen facts that are highly suggestive of these
11 communications occurring.

12 We see a late night phone call from Lockton. We see
13 the sudden reversal in position from the corporate insurance
14 carrier. We see banks that had been participating with the NRA
15 to provide basic depository services, participating even after
16 the Parkland tragedy and the grassroots boycott efforts that
17 followed, suddenly start dropping us and they won't say why, but
18 we have reason to believe based on all of these, the draft of
19 other facts that it is likely that they had some interaction
20 with regulators.

21 Here's another fact I'll note. In connection with a
22 brief on the motion for expedited discovery, the state submitted
23 a declaration where it admitted or addressed some of the facts
24 in our complaint. So for example, the state admits in that
25 declaration that the Carry Guard inquiry was orchestrated or

NRA of America v. Cuomo et al. - 18-CV-566

1 prompted by Everytown for Gun Safety, which is an anti-NRA
2 organization. They say Everytown brought a dossier to Cy Vance,
3 who showed it to DFS, who acted. But the state doesn't deny --

4 (Reporter clarification.)

5 MS. ROGERS: They may deny at depositions. They may
6 produce documents that contradict it. We expect the opposite,
7 but we think that allegation at least survives 12(b)(6) scrutiny
8 and it deserves discovery.

9 The state mentions that companies nationwide, Bank of
10 America, Delta, Enterprise also severed some ties with the NRA
11 in the aftermath of Parkland. Discovery will help us flesh out
12 too the distinctions between these entities and the banks and
13 insurers at issue. These are very different types of corporate
14 relationships.

15 So Delta, for example, and we didn't say this in our
16 brief because I didn't see it until the reply, but I believe it
17 was publicized that Delta Air Lines had about 12 people who took
18 advantage of that discount. It was a very small corporate
19 relationship, not the same thing at all as a major insurance
20 relationship or a bank depository type of relationship.

21 So the state mentions that there's been a national
22 shift politically in favor of increased gun control and
23 shouldn't public officials be allowed to exercise their First
24 Amendment right to participate in that. The answer is
25 certainly. The NRA has not sued Governor Cuomo for criticizing

NRA of America v. Cuomo et al. - 18-CV-566

1 it. As the complaint recounts, he's done so for decades. He's
2 done so vociferously, and that's the tradition of vigorous
3 public debate that the NRA supports and participates in.
4 Governor Cuomo can criticize the NRA on Facebook, on Twitter,
5 from the Statehouse steps, in appeals to his constituents. He
6 can pursue the legislative process to enact whatever
7 Constitutional gun control he wants.

8 What he can't do and what he can't enlist a banking
9 regulator to do is issue official regulatory directives to
10 financial institutions accompanied by penalties that are
11 choreographed to coincide and convey the message that even if
12 you want to do lawful business with the NRA, that's going to
13 result in regulatory disfavor and regulatory reprisals.

14 So with that, I'd like to address the consent orders
15 and this argument that the whole insurance investigation is
16 about unlawful conduct, and I think I'm going to quote the state
17 again here, that therefore because there's unlawful conduct and
18 because they're policing insurance markets, there's no First
19 Amendment analysis at all. Again that's simply not the law
20 because even when the state is conducting a regulatory policing
21 function, even when there is unlawful conduct, the state can't
22 conduct that enforcement function in viewpoint-discriminatory
23 manner.

24 One of the biggest cases on this is the Supreme
25 Court's decision in *R.A.V. v. St. Paul*, 1992. There you had a

NRA of America v. Cuomo et al. - 18-CV-566

1 statute that explicitly targeted conduct outside the scope of
2 the First Amendment. It targeted fighting words, the types of
3 communications that courts have repeatedly held have no First
4 Amendment protection. I believe the conduct at issue in R.A.V.
5 v. St. Paul was somebody burned a cross on somebody's lawn. You
6 can regulate that, the Supreme Court says, but what you can't do
7 is regulate it based on the viewpoint of the person engaging in
8 it. So you can't regulate only racist fighting words. It has
9 to be all fighting words.

10 Here, the state can certainly regulate the manner in
11 which insurance is brokered and endorsed and the manner in which
12 insurance premiums are structured. What it can't do is what
13 it's done here. It can't go after only the NRA. Take two
14 identical insurance policies, one has NRA's logo on the top, one
15 that says Sierra Club, and decide that this one is unlawful and
16 this one, the regulators aren't going to touch.

17 That's our selective enforcement claim, which
18 defendants don't even challenge the merits of. They just
19 challenge standing there, and that's not within the scope of
20 this argument. But it's telling because the state claims that
21 they engaged in just a good faith exercise of its lawful police
22 function, and that's not what it's engaged in.

23 I think discovery will tell us more about this
24 insurance investigation, but here's what we know about it now.
25 We know, number one, it was orchestrated and prompted by

NRA of America v. Cuomo et al. - 18-CV-566

1 Everytown. Everytown is not an insurance NGO. Everytown is an
2 anti-NRA organization. That fact may not be dispositive, but
3 within the constellation of facts that tell us whether this was
4 a good faith exercise of police power or whether it is a
5 coercive partisan pursuit by a political enemy, that fact
6 matters.

7 Number two, we know that that inquiry very quickly
8 expanded beyond its purported focus, Carry Guard. We know that
9 now DFS is looking at Lloyd's, which had nothing to do with
10 Carry Guard. DFS concedes in its motion papers that it is now
11 looking at pretty much all the NRA's insurance relationships,
12 and the response to this is cursory. They basically say, "Well,
13 there could have been violations that apply to programs other
14 than Carry Guard. For example, the way the insurance is
15 marketed."

16 I'll put some flesh on the bones of that allegation.
17 So in the consent orders, there are certain provisions that
18 address the way some of the insurance was marketed that don't
19 pertain specifically to Carry Guard. For example, consent
20 orders, one of the Lockton consent orders states that it failed
21 to secure three declinations from out-of-state insurers before
22 placing an excess line policy. What's interesting is if you
23 look at the prospective conduct provisions of those consent
24 orders, Lockton isn't prohibited from doing that stuff with
25 respect to anybody other than the NRA.

NRA of America v. Cuomo et al. - 18-CV-566

1 So Lockton, for example, admits that it violated the
2 law by offering no-cost insurance to NRA members in good
3 standing, but we know that Lockton offers no-cost insurance to
4 members in good standing of other organizations. We quote their
5 website in our complaint exactly verbatim the same language as
6 the NRA. No action on that, and Lockton isn't forbidden from
7 doing that in the future.

8 The state is basically creating a regime where you can
9 offer no-cost insurance to your members if you're an affinity
10 group except if you're the NRA or we suspect other gun promotion
11 organizations, as the guidance letters suggest. So we contend
12 that the consent orders do warrant First Amendment analysis and
13 that that First Amendment analysis favors rejecting this motion
14 and sustaining our claims.

15 With respect to the consent orders, the state also
16 argues the Lockton, Chubb, and others are free to agree to
17 whatever they want. They're free to agree to give up their
18 business relationship. Well, it may be true that Lockton,
19 having entered into a consent order, does not have a claim, but
20 the NRA has a claim. We did not receive due process in
21 connection with that consent order, and we have a claim in
22 connection with it.

23 We would also suggest that it is strains credulity to
24 argue that this was a completely free volitional decision by
25 Lockton and Chubb. We're analyzing whether the state's conduct

NRA of America v. Cuomo et al. - 18-CV-566

1 is coercive and whether you're seeing response as coercion.
2 Obviously a settlement with a regulator where you pay almost a
3 million dollar fine is a situation that bears some indicia of
4 coercion.

5 Let's see. Here's another item I want to address. So
6 the state then in its creative maneuver argues that since we've
7 argued that this a case about speech and not unlawful conduct,
8 that the NRA has an abandoned its allegations relating to the
9 press releases that announce the consent orders, but that's not
10 true.

11 And here's a key excerpt that I just want to read to
12 you from the press release attached as exhibit D because this
13 too bears on what the government's real objective is here. So
14 the government points to some carve-out language in both the
15 Lockton and Chubb consent orders that prohibit certain corporate
16 insurance policies and they say, "Look. This shows that we're
17 not trying to choke off financial services to the NRA. We're
18 just dealing with specific, surgical types of affinity
19 insurance."

20 But that's not the message the government wanted the
21 public to receive, and we know that because in the May 7, 2018,
22 press release that announced the Chubb consent order, the
23 government states that Chubb agrees to refrain from entering
24 into any agreement or arrangement, any other agreement or
25 arrangement including affinity-type insurance program, but not

NRA of America v. Cuomo et al. - 18-CV-566

1 limited to it, including involving any line of insurance
2 involving a contract of insurance involving the NRA directly or
3 indirectly.

4 So the government's communications are far from clear
5 on this point, and as the complaint alleges, other institutions
6 such as our corporate carrier appeared to have gotten the
7 message set forth in this press release. We allege that's not a
8 coincidence. It's a campaign, and we would like discovery to
9 prove that out.

10 Finally, there's this notion that the NRA failed to
11 allege that it engages in particularized instances of speech. I
12 think the kindest thing that I could say about that argument is
13 that the state has the First Amendment freedom to make it, but
14 as the ACLU puts forth eloquently in its brief, that's not an
15 element of a First Amendment claim.

16 We know that because if we look at the cases, even the
17 cases that the states cites which we've gone through already.
18 Okwedy, there's talk about other billboards, not just this one.
19 In Rattner, the state finds -- the Court finds persuasive that
20 the chamber of commerce was persuaded not just to censor that
21 one letter, but to entirely divorce its newsletter from the
22 chamber of commerce. It doesn't even want to be in the
23 newsletter business anymore because the notion that it can
24 engage in politically tinged communication has been endangered
25 by this coercion. It's been broadly chilled. Bantam Books,

NRA of America v. Cuomo et al. - 18-CV-566

1 likewise.

2 So this particularized speech thing is not an element,
3 and contrary to what the state suggests, we are not advocating
4 the slippery slope where you can't do anything adverse to an
5 advocacy group without giving rise to a First Amendment claim.
6 To the contrary, I think if we're talking of drawing lines and
7 inviting slippery slopes, then we have to look at the line the
8 state has drawn because if the state gets its wish, the Court
9 closes the doors to the NRA on these facts alleged here drawing
10 all favorable inferences to the NRA, it is difficult to envision
11 a fact pattern that would give rise to a First Amendment claim
12 on behalf of an advocacy group that was pursued or persecuted by
13 the state. I mean you would literally need I guess an explicit
14 statute banning the NRA from New York or the like.

15 What we have here is we have regulatory documents that
16 explicitly single out the NRA on the basis of its viewpoint.
17 That's what the guidance letters do. They say gun promotional
18 organizations. They don't say organizations that sell murder
19 insurance or organizations that participate in affinity
20 insurance. They say organizations that promote gun rights, and
21 we have a constellation of surrounding facts and government
22 actions that really drive home the threat that is communicated
23 in a slightly veiled fashion in those letters.

24 There are no attenuated mental gymnastics required in
25 order to connect the dots between the DFS exhorting banks to

NRA of America v. Cuomo et al. - 18-CV-566

1 drop the NRA and banks dropping the NRA. The dots on this time
2 line connect themselves, Your Honor, we believe, and we think
3 discovery will substantiate those connections even further.

4 The notion that the NRA's freedom of association has
5 not been harmed because it hasn't lost access to every single
6 bank, it just has fewer banks that are willing to do business
7 with it now, also bears scrutiny. That is not the law.

8 What the state is essentially asking here and it
9 invites the same kind of consequence that makes the argument our
10 speech hasn't been chilled yet is that we have to wait for the
11 government to go around and put a gun to the head of every bank
12 one by one until we have no checking accounts, no way to pay
13 lawyers, which is very important. Then when our work is done,
14 then you can vindicate our First Amendment rights in court.
15 That can't be the law. The Constitution can't countenance that,
16 and it doesn't.

17 We've already addressed the notion that DFS, because
18 it only regulates banks and insurers who do business in New
19 York, couldn't possibly affect the NRA more broadly. I think
20 that we refuted that. We've addressed this carve-out for
21 corporate insurance.

22 I would like to address now the due process claim. So
23 the NRA alleges two separate due process claims, stigma plus and
24 the deprivation of contract rights without due process of law.
25 So here are the elements of stigma plus because I think the

NRA of America v. Cuomo et al. - 18-CV-566

1 state misstates them a bit. So you have to have the utterance
2 of a statement that is derogatory enough to injure the
3 reputation that is capable of being proven false.

4 I think the statement made in the guidance letters
5 which the state reiterates here that the NRA is such a
6 reputational risk, it promotes violence to such an extent that
7 it poses a risk to the soundness of a bank or insurer who does
8 business with it, that is capable of being proven false.
9 Discovery will prove it false, and it's certainly a statement
10 injurious to the NRA's reputation. Now, the next element is you
11 have to have actually the plus. You have to have concrete harm.
12 Here we've pleaded ample concrete harms.

13 There are a few cases we cite that parallel this case.
14 One in particular, let me see. National Council of Resistance
15 of Iran versus the Department of State. There, it's a very
16 similar situation. You have the state labeling this
17 organization as a terrorist organization. So it's not supposed
18 to receive banking services, and that is a deprivation of a due
19 process right. That's a deprivation of a property right.

20 Here the only difference is there's no allegation that
21 the NRA is funding terrorism. The allegation is that the NRA
22 promotes Second Amendment rights, and that is sufficient in the
23 eyes of the state to treat the NRA the way the federal
24 government during the Iraq war era treated certain radical
25 Muslim organizations.

NRA of America v. Cuomo et al. - 18-CV-566

1 So then we've got our second due process claim, which
2 is that we've been deprived of the property interest without due
3 process of law. Here we have multiple contracts with Lockton,
4 Lloyd's, et al. have indicated that they will cancel or decline
5 to renew. We have Lockton in particular that is now refusing to
6 perform key elements of its existing contract that's exclusively
7 because of state coercion. We have Lloyd's of London telling
8 the New York Times it's severing ties with the NRA explicitly
9 because of state coercion.

10 That is a property right of which we've been deprived.
11 We had no opportunity to contest it, and it was arbitrarily
12 done. We were singled out and deprived of valuable business
13 relationships. So that implicates the due process clause of the
14 United States Constitution.

15 One thing I haven't explicitly addressed is the
16 association of rights. So the genesis of the free association
17 right in the First Amendment is first articulated in the NAACP
18 cases that started in 1958. And there, the standard is that if
19 the government directly and substantially or significantly
20 burdens the ability of a group to associate for expressive
21 purposes, that a free association claim under the First
22 Amendment arises.

23 And that case, when it's first articulated with
24 respect to NAACP, it governed the state wanted to force the
25 NAACP to disclose all its members so they could be basically

NRA of America v. Cuomo et al. - 18-CV-566

1 intimidated out of supporting the NAACP. The Court says no.
2 That right has been extended to cover the privacy of donors as
3 well because expressive association incorporates the ability to
4 receive donations and fund our activities.

5 Our argument on free association is simply this: That
6 if the disclosure of members or donors interferes with free
7 association right, then so too does a government campaign
8 designed to deprive us of the ability to collect donations in a
9 bank account or hold insurance that would allow us to have
10 physical premises or meetings in a meeting hall. Those are core
11 elements of expressive association, and the government conduct
12 implicates them in a way that is Constitutionally troubling.

13 And with that, unless Your Honor has any questions,
14 I'd like to reserve the balance of my time.

15 THE COURT: I'm afraid to ask a question after all
16 that. The presentations were good. They're well done. They
17 followed the briefs you submitted. They actually fleshed out
18 some points the Court hadn't considered before in the way they
19 were presented, which may affect the outcome of the decision.

20 So what the Court is going to do now is excuse
21 everybody. I have a sentencing at 11:30. I have to see
22 probation. I will issue a written opinion quite quickly. So
23 thank you very much for participating. It really was
24 interesting. Each side did a really good job. I want to thank
25 you for the effort that you put into it. So we'll see what

NRA of America v. Cuomo et al. - 18-CV-566

1 comes out. Court stands adjourned.

2 (The matter adjourned at 11:01 a.m.)

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JACQUELINE STROFFOLINO, RPR
UNITED STATES DISTRICT COURT - NDNY

NRA of America v. Cuomo et al. - 18-CV-566

CERTIFICATION OF OFFICIAL REPORTER

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Dated this 17th day of September, 2018.

/s/ JACQUELINE STROFFOLINO

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**JACQUELINE STROFFOLINO, RPR
UNITED STATES DISTRICT COURT - NDNY**